Supreme Court, U.S.
FILED
FEB 18 1999
CLERK

No. 98-1091

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TIME WARNER ENTERTAINMENT CO., L.P., *ET AL.*,

Petitioners,

v.

PATSY ANN BYERS, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of Louisiana, First Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents' brief in opposition confirms petitioners' position: The court below has departed dramatically from the First Amendment standard laid down in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). According to respondents and the court below, "Petitioners *intended* to *facilitate* imminent unlawful conduct *and are therefore unprotected* per *Brandenburg*." Opp. 12 (emphasis added). Respondents thus concede that the principal question of First Amendment law raised in the petition is squarely presented here—*i.e.*, whether mere intent, standing alone, is sufficient to satisfy the requirements of the *Brandenburg* exception. That question is plainly one of substantial importance, and it is ripe for decision now.

Respondents attempt to hide behind state pleading rules, suggesting that this case is in its "embryonic" stages and that any errors below can be corrected in subsequent proceedings. In so arguing, respondents ignore the fact that the decision below rests squarely on an erroneous interpretation *of the First Amendment*. As such, the decision below will control the future course of litigation in this and countless other First Amendment cases unless and until the court of appeal's error is corrected by this Court. Immediate review is therefore necessary, before the glaringly incorrect decision below results in a further chilling of protected speech.

I. The Decision Below Dramatically Departs From The Overt Advocacy, Imminence, And Likelihood Requirements Established In *Brandenburg* And Adhered To In Numerous Precedents Of This And Other Courts

Respondents halfheartedly suggest that the court below must have adhered to *Brandenburg* because it acknowledged the existence of the imminence and likelihood requirements. Opp. 6-7 & n.3 (citing Pet. App. 15a). They concede, however, that the only allegation relied upon by

the court below as sufficient to satisfy *Brandenburg* is that of subjective intent to incite lawless action (Opp. 6). That allegation does not even describe the actual content of petitioners' film, let alone allege facts sufficient to demonstrate that the film itself actually satisfies the advocacy, imminence, and likelihood requirements. As if to dispel any doubt that the court below reduced *Brandenburg* to a one-step test satisfied solely by an elliptical allegation of the speaker's subjective intent, respondents unabashedly assert that the court of appeal was correct in focusing exclusively on petitioners' intent: "Petitioners *intended* to *facilitate* imminent unlawful conduct and are *therefore* unprotected per *Brandenburg*." Opp. 12 (emphasis added); *see also id.* ("If . . . Petitioners intended . . . that those exposed to their speech 'go out and kill somebody' right after seeing the movie, then their conduct is . . . unprotected by the First Amendment.").[1]

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[1] The heavy reliance that respondents and the court of appeal place on *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 1515 (1998), further confirms their rejection of key elements of the *Brandenburg* test. The *Rice* court did not find that the speech at issue in that case—detailed instruction in the techniques of criminal activity—fell within the *Brandenburg* exception. Instead, the *Rice* court held that *Brandenburg* does not even apply to such "speech-act[s]." *Id.* at 244, 255. Neither the court below nor respondents assert that petitioners' feature-length film constitutes a "speech-act," or that *Brandenburg* is inapplicable here, but they nonetheless rely on the test applied in *Rice*—which expressly rejects *Brandenburg*'s imminence and likelihood elements. *See id.* at 246 ("*Brandenburg's* 'imminence' requirement [does not restrict punishment of] . . . 'successful efforts to assist others by detailing to them the means of accomplishing the crimes.'") (citation omitted); *id.* at 263-65 (rejecting "imminence" and "likelihood" elements). Thus, respondents' invocation of *Rice* simply confirms that the decision below amounts to a clear departure from *Brandenburg*.

Respondents attempt to shield the court of appeal's First Amendment ruling from review by asserting that it somehow rests upon Louisiana pleading principles. In respondents' view, apparently, the court of appeals' departure from the *Brandenburg* test is explained by the fact that Louisiana courts (like most American courts) treat allegations as true and read them "generously" at the pleadings stage. Opp. 6-7. Louisiana's pleading rules are irrelevant, however. Petitioners do not challenge the court of appeal's decision to assume the truth of respondents' intent allegation, however far-fetched. Instead, petitioners seek review of the court of appeal's patently erroneous conclusion that, as a matter of federal constitutional law, subjective intent alone suffices to pierce the shield of the First Amendment.

Nor is the Louisiana court of appeal's rule of First Amendment law explainable as a "generous" interpretation of facially ambiguous allegations. The court made no pretense of examining the complaint for allegations sufficient (even when read "generously") to support findings that the content of the film was itself sufficient to satisfy the overt advocacy, imminence, and likelihood requirements. Instead, the court looked *solely* to petitioners' subjective state of mind, and made clear that, under its reading of the First Amendment, subjective intent *alone* is the touchstone for liability. That conclusion is not a rule of pleading; it is a patently incorrect and dangerously narrow construction of the Constitution's free speech guarantee.

Importantly, respondents do not challenge the principle that the First Amendment imposes a heightened pleading requirement on plaintiffs seeking to impose liability on presumptively protected speech. *See* Pet. 20 (citing *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 264-65 (1994) (Souter, J., joined by Kennedy, J., concurring); *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1063 (9th Cir. 1998); *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177 n.8 (10th Cir. 1982)). Thus,

even if respondents' claim that Louisiana courts read allegations "generously" might have some explanatory power in other circumstances, it is doubly irrelevant here: There is nothing to suggest the decision below rests on such a doctrine, and it would have been constitutional error for the court of appeal to apply that doctrine in this case given the obvious First Amendment implications of respondents' claims. Respondents cannot shield a state court decision from this Court's scrutiny by pointing to a state procedural rule that was not invoked, and could not constitutionally be applied if it were.

Respondents also assert in passing that "most" of the conflicting authorities cited by petitioners arose at the summary judgment stage or after a trial, apparently in an attempt to suggest that those cases can be meaningfully distinguished on that ground. *See* Opp. 9 n.5. As noted in the petition (Pet. 20), however, claims closely analogous to respondents' have consistently been dismissed at the pleadings stage as well. *See, e.g.*, *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 191-95 (Ct. App. 1988); *National Org. for Women, Inc. v. Scheidler*, 897 F. Supp. 1047, 1083-89 (N.D. Ill. 1995); *Zamora v. Columbia Broadcasting Sys.*, 480 F. Supp. 199 (S.D. Fla. 1979). Respondents point to no authority for their apparent belief that *Brandenburg* is somehow inapplicable at the pleadings stage, nor does any such authority exist.

In the end, respondents simply are unable to show that their allegations even begin to satisfy the elements of the *Brandenburg* exception. Indeed, far from refuting petitioners' arguments that respondents' allegations fall well short of the constitutional requirements, respondents' own factual clarifications weigh heavily against the constitutional adequacy of their allegations. Thus, respondents acknowledge that Edmondson and Darrus viewed *Natural Born Killers* in Oklahoma, drove through Mississippi, and only then entered Louisiana, where they were purportedly "incited" (by a film seen many hours or days earlier) to shoot respondents' decedent. Opp. 2. As demonstrated in

the petition (Pet. 16-18), this fact alone compels the conclusion that respondents cannot satisfy the "imminence" requirement. Yet the court of appeal glossed over that fatal flaw in respondents' case by the simple expedient of eliminating the imminence requirement altogether (and the advocacy and likelihood requirements as well).

Perhaps recognizing the obvious errors in the court of appeal's interpretation of the First Amendment, respondents argue in the alternative that even if their allegations fail to satisfy the requirements of *Brandenburg*, under Louisiana law they "would be nonetheless allowed to amend their petition to state with particularity all elements of the *Brandenburg* test." Opp. 7. Had the court of appeal followed that approach, of course, petitioners would not be before this Court. But the court below did *not* hold that respondents' failure to satisfy the advocacy, imminence, and likelihood elements required dismissal or repleading. Instead, the court of appeal simply dispensed with those crucial elements altogether, holding *as a matter of First Amendment law* that intent alone suffices to satisfy the *Brandenburg* test. *See* Pet. App. 15a ("[o]nce accepted as true," the allegation that petitioners "intended to incite viewers of the film to begin, shortly after viewing the film, crime sprees" suffices in itself to place the film "into the unprotected category"). It is that egregiously wrong pronouncement of First Amendment law that necessitates this Court's review.

II. The Decision Below Conflicts With The Requirement That Plaintiffs Must Point To Objective Manifestations Of Intent

Respondents do not contest that the challenged speech must contain objective manifestations of intent to incite immediate violence, and that courts must conduct an independent review for such manifestations before liability can be imposed. *See Hess v. Indiana*, 414 U.S. 105, 109 (1973) (*Brandenburg* requires "evidence or rational inference from the import of the language" that the speech was

"intended to produce, and likely to produce, *imminent* disorder") (emphasis in original); *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 499 (1984) (courts have "an obligation to 'make an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.'") (citation omitted). Indeed, respondents' brief in opposition even quotes *Rice v. Paladin* to the effect that "the speech itself" must contain a "basis for a permissible inference that the speaker intended" an illegal end. Opp. 11.

Instead, respondents argue that Louisiana procedural rules bar the introduction of evidence when a defendant challenges the legal sufficiency of a complaint on its face, and note that petitioners adhered to these rules in the court below. Opp. 8. Once again, respondents' recourse to state pleading rules is of no avail, and misses the point. At the pleadings stage, plaintiffs need not provide tangible evidence to support their claims, but their allegations regarding "the speech itself" must at least provide a "basis for a permissible inference that the speaker intended" to incite illegal action. Opp. 11. State procedural rules do not and cannot relieve respondents of their obligation to allege facts regarding the nature and content of the challenged speech sufficient to provide reasonable, objective manifestations of the speaker's intent. Nor can state procedural rules relieve state courts of their First Amendment duty to review the totality of the plaintiff's allegations for such objective manifestations, as well as objective manifestations of the other, equally critical components of the *Brandenburg* standard: advocacy, imminence, and likelihood. *See* Pet. 20, 22-24; *Bose*, 466 U.S. at 499. Plainly, none of these obligations was satisfied here.

III. Immediate Review Is Essential In Order To Avoid Chilling Protected Speech

Respondents' brief in opposition devotes much energy to the proposition that the glaring errors in the decision

below need not concern this Court because they can be corrected in subsequent proceedings. Thus, respondents argue that no one has been "irretrievably hauled into court" (Opp. 1), and that nothing has been decided "with *any* finality" (Opp. 9), because petitioners' First Amendment rights might still be vindicated "after discovery." Opp. 5, 9. On that premise, respondents urge this Court not to "delve too deeply into [the] merits" (Opp. 1 n.1), and claim that "[t]his case does not . . . present a federal constitutional question ripe for adjudication" (Opp. 12). Respondents' efforts to avoid review are wholly unpersuasive.

First, the court below ruled as a matter of First Amendment law that *all* elements of the *Brandenburg* test are satisfied *solely* by a speaker's subjective intent to cause violence in the future. Contrary to respondents' assertion that this ruling does not "change[] constitutional law in any way" (Opp. 1), the decision below substantially modifies, and dramatically expands, the previously narrow *Brandenburg* exception. Absent immediate review, the court of appeal's published decision will undoubtedly affect further proceedings in this case and in other First Amendment cases. The decision below will inevitably inhibit speech that falls within the court of appeal's new, radically expanded version of the *Brandenburg* exception; indeed, it would be irrational for mass media speakers not to examine and perhaps modify their speech with an eye to avoiding similar claims. "[I]t would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 56 (1989).

In addition, respondents' repeated protests that the First Amendment can still be vindicated "after discovery" further belie their claim that the decision below will not chill protected speech. If the underlying complaint has no merit—as respondents' protests and their inability even to plead adequate facts plainly indicate—then there is no reason not to swiftly vindicate vital First Amendment values and dismiss the action now. Allowing meritless lawsuits

to "drag on through the discovery stage" may induce parties exercising First Amendment rights "to forego presenting [their] views." *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1082 (9th Cir. 1976). Prolonging the life of this action would send the clear message that disfavored speech and speakers can be punished by being forced to undergo the rigors and costs of burdensome discovery, even if the underlying claims are wholly lacking in merit.

The court of appeal's exclusive and erroneous focus on subjective intent only exacerbates this chilling effect. Questions of subjective intent are inherently difficult to resolve prior to trial, and necessarily invite costly and intrusive discovery. The decision below strips *Brandenburg* of all of its objective factors—the elements that could otherwise be called forth at the pleadings stage to dispatch speedily a frivolous lawsuit. By conditioning liability solely on the "motivations" of the defendant, and thereby increasing the burden and expense of First Amendment litigation, the decision below inevitably will have "a chilling effect on exercise of" expressive rights. *Franchise Realty*, 542 F.2d at 1082. Significantly, respondents offer no response to (and certainly do not challenge) petitioners' observation that "[a]bsent plenary review by this Court at this stage of the litigation, the creative world will soon be treated to the spectacle of a respected and innovative film director being subjected to extensive discovery into his creative thought processes, all in furtherance of the lower court's erroneous and single-minded focus on the speaker's subjective intent." Pet. 27.

That further proceedings await petitioners is no excuse for denial of review in this Court. Even if the court of appeal's expansive construction of the *Brandenburg* exception were not an ongoing threat to petitioners' further defense, this Court's immediate review would be necessary to "avoid[] making vindication of freedom of expression

await the outcome of protracted litigation." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).

CONCLUSION

The petition for a writ of certiorari should be granted. As suggested by *amici* the Motion Picture Association of America *et al.*, the Court may wish to consider summary reversal.

Respectfully submitted.

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February 18, 1999